

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 94-183**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated November 1991.]**

#### **1. Statutory Authority**

a. Section 146.20 (4), Stats., specifically requires that an applicant for a servicing license must execute and deposit with the department a surety bond. Section NR 113.05 (1) (b) provides that a security deposit or irrevocable letter of credit may be accepted in lieu of a surety bond. What statutory authority exists for this rule provision?

b. Section 146.20 (3), Stats., provides that a person licensed to service septage must paint on the side of any vehicle that is used for servicing the words “Wisconsin Sanitary Licensee” and immediately under these words “License No.....” The letters and numbers painted on the side of the vehicle must be at least two inches high. Section NR 113.06 (3) (m) 2 provides that the statements quoted must be painted on both sides of a vehicle and the letters and the numbers must be at least four inches high. What statutory authority exists for requiring painting on both sides of a vehicle with letters and numbers that exceed the required height in s. 146.20 (3) (c), Stats.?

c. The penalty for violation of the statutes or rules related to septage disposal is established in s. 146.20 (6), Stats., and consists of a forfeiture of not less than \$10 nor more than \$5,000 for each violation. What is the department’s authority to specify, in s. NR 113.16 (3), that the forfeiture amount for each violation is \$500?

#### **2. Form, Style and Placement in Administrative Code**

a. In s. NR 113.02 (intro.), the phrase “These rules shall be applicable” should be replaced by the phrase “This chapter applies.”

b. Section NR 113.03 (intro.) should be rewritten to read: “In addition to the definitions in s. 146.20, Stats., in this chapter:”. The reference to s. 144.01 should be deleted and the appropriate definitions incorporated into the rule, because it appears that only a few of s. 144.01 terms are used in the rule. Also, the statutory cross-reference in s. NR 113.03 (22) should be eliminated.

c. In s. NR 113.03 (23), the phrase “For the purposes of these rules” should be deleted.

d. In s. NR 113.03 (34), the citation should read “chs. NR 214, 500 to 522 or 600 to 685.” In other words, the citations should be listed chronologically. The entire rule should be reviewed for this problem.

e. “Etc.” should not be used in s. NR 113.03 (47).

f. In s. NR 113.03 (50), the defined term should be “privy.”

g. In s. NR 113.03 (63), the second sentence is not part of the definition and either should be deleted or placed somewhere else in the rule.

h. The cross-reference to s. NR 113.05 in s. NR 113.05 (3) (a) should be changed to “this section.” Also, the reference to s. NR 113.05 (3) (a) should be changed to “sub. (3) (a).” Also, in sub. (3) (e), the reference to s. NR 113.05 (1), (2) and (3) should be removed from the list and separately referenced as “subs. (1) and (2) and this subsection.”

i. The reference to “this chapter” in s. NR 113.06 (2) should be to “this section.”

j. The cross-reference to sub. (3) (m) 1 in s. NR 113.06 (3) (intro.) should be changed to “par. (m) 1.”

k. In s. NR 113.06 (3) (d) (intro.), the phrase “shall be” should be replaced by the word “is.”

l. In s. NR 113.06 (3) (n), it appears that the word “provision” should be replaced by the word “paragraph.”

m. In the Note to s. NR 113.06 (4) (c), it is unnecessary to include the notation “Wis. Adm. Code.” [See, also, s. NR 113.03 (73m).]

n. In s. NR 113.08 (1) (a), the phrase “For the purposes of this section, winter refers to” should be replaced by the phrase “In this section, ‘winter’ means.” In par. (b), the phrase “be required to” should be deleted.

o. Paragraph titles in s. NR 113.08 (2) and (3) should be underlined.

p. The cross-reference to s. NR 113.08 (3) (d) 3 in s. NR 113.08 (3) (d) 1 should be changed to “subd. 3.”

q. The first two subdivisions of s. NR 113.08 (3) (d) are alternatives and should therefore be combined in a single subdivision. Those two subdivisions could be changed to

subpars. a and b and an introductory paragraph to the subdivision could be added as follows: “1. Pathogens shall be reduced by one of the following methods:”.

r. The title in s. NR 113.08 (3) (d) 3 should be deleted and an introductory paragraph should be substituted: “3. Pathogen reduction is achieved by the following site restrictions:”.

s. In s. NR 113.08 (3) (e) 1, the phrase “shall be” should be replaced by the word “is.” Also, the notation “; or” concluding subds. 1 and 2 each should be replaced by a period.

t. In s. NR 113.10 (2m), the phrase “this regulation” should be replaced by a reference to “this section” or “this chapter,” as appropriate.

u. In s. NR 113.11 (intro.) and (1) (b), the phrases “this code” and “department codes” should be replaced by appropriate cross-references. The introductory material in this section does not lead grammatically into following units. Consequently, it should be renumbered as a subsection and following subsections should be renumbered. [See, also, s. NR 113.10.]

v. The cross-reference to s. NR 113.12 (4) (b) in s. NR 113.12 (3) (c) should be changed to “sub. (4) (b).”

w. Section NR 113.13 (1) and (2) (title) refer to existing in-ground or above-ground facilities and new construction. There should be date-specific provisions regarding these facilities and this construction to avoid confusion in the future.

x. In s. NR 113.16 (2), the phrase “this code” should be replaced by the phrase “this chapter.”

y. The correct citation in the effective date provision is s. 227.22 (2) (intro.), Stats.

z. Where possible, the numbering of the rule should be made consecutive. See, for example, the subdivision numbering in s. NR 113.08 (3) (b) and (c). The entire rule should be reviewed for this problem.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

The rule requires information to be submitted on a variety of forms. The department should ensure that the requirements of s. 227.14 (3), Stats., are met.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. “These wastewaters” in s. NR 113.01 should be changed to “wastewaters from these sources.”

b. It is not clear why the second sentence in s. NR 113.02 (7) is necessary. There is no ambiguity in the first sentence, and no reason to think that the first sentence might include transportation of septage to the facility.

c. Can the first sentence of s. NR 113.03 (1) be clarified by adding “after septage is applied to the land” at the end of the sentence? Also, is there a difference between range land and land used as pasture?

d. What does “whole” mean in s. NR 113.03 (1m)? Also, the term “vegetation” is confusing because it would include all of the other types of described crops.

e. Why is the application rate in s. NR 113.03 (2) expressed in gallons per acre per week, but the application rate in s. NR 113.03 (1m) expressed on a dry weight basis?

f. The terminology used to describe persons subject to ch. NR 113 should be clarified, simplified and made consistent. The rule uses the following terms to describe persons subject to ch. NR 113, without any coherent distinction in the way these terms are used: “business,” “licensed business,” “certified operator,” “licensed disposer,” “person engaged in servicing,” “person or business engaged in servicing,” “person subject to the requirements of this chapter” and “licensee.” If the defined term “business” is retained, that term should not include a body politic. If the defined term “certified operator” is retained, it should be modified to mean “any person engaged in servicing,” because “servicing” is a defined term.

g. Should the definition of “dormant field” in s. NR 113.03 (16) be changed to “dormant land.” That appears to be the term used in the rule. Also, the definition should be augmented to indicate that the field will not be used within 12 months of some stated event.

h. Section NR 113.03 (21) defines the term “grease interceptor.” Why is the statutory term “grease trap” in s. 146.20 (2) (b), Stats., ignored? Also, every term defined in the rule that also is defined in the statutes should be compared to ensure their equivalence.

i. The definition “historical site” in s. NR 113.03 (25m) is incorrect. The Wisconsin Trust for Historic Preservation does not designate historical sites and is not a state agency. The department should consult the State Historic Preservation Officer for a more appropriate definition of this term.

j. “Noncommunity well” is defined in s. NR 113.03 (38) as “a public well that is not a community well.” The rule defines “community well” but not “public well.”

k. Is the definition of “pathogens” necessary? The definition adds nothing to the dictionary definition of the term, and the term does not appear to be used in a technical sense in the rule. Also, what is the meaning of “certain”?

l. Is “permit,” as defined in s. NR 113.03 (42), used in the text of the rule? If not, should this definition be combined with the definition of “WPDES permit” in s. NR 113.03 (76)?

m. In s. NR 113.03 (43), the calculation of permeability is not part of the definition and should be placed in another portion of the rule.

n. In s. NR 113.03 (49), what does the phrase “on one property” mean?

o. In the definition in s. NR 113.03 (52), who are the contracting parties? Is it necessary only that a contract has been developed, or must the parties have signed the contract?

p. Can the definition in s. NR 113.03 (53) be made more useful by describing the type of planning that is contemplated?

q. In s. NR 113.03 (56m), it appears that the definition should be rewritten to read: “‘Restricted public access’ means the limitation of entry to private property for a period of time by means such as signs, traditional agricultural fencing or remote location.”

r. In s. NR 113.03 (57) and (59), is it possible to have an area excavated larger than five feet in width that has only one distribution line? If so, this excavation should be included in the definitions.

s. Is “oxidation” necessary in s. NR 113.03 (61)? If a septic tank functions in anaerobic conditions, oxidation does not occur.

t. Can the definition in s. NR 113.03 (74) be clarified by describing what is meant by “in which the disposer has been given due process.” Does this require that an order has been issued? Is the consequence of this definition that a person cannot violate a provision of the chapter if due process has not yet been given?

u. Section NR 113.04 (2) should be clarified by describing the kind of change in servicing equipment that requires notification to the department.

v. The strike-through in the title of s. NR 113.05 should be deleted.

w. “Servicing” is a defined term and adding “the practice of” before “servicing” is unnecessary. See s. NR 113.05 (1) (a).

x. Fees are mentioned at several places in s. NR 113.05. Is there any reason why the various references to fees cannot be replaced by cross-references to the fee and bond schedule in s. NR 113.05 (5)?

y. In s. NR 113.05 (1) (b), the bond must be conditioned on conformity with “all applicable health laws and rules.” Does this mean that the bond must apply to health laws and rules other than those in ch. NR 113? If so, those health laws and rules should be specified.

z. Section NR 113.05 (2) establishes department requirements for initial licensure. The first sentence of s. NR 113.05 (2) (c) establishes an applicant requirement and would apparently be better located in s. NR 113.05 (1). The second sentence of sub. (2) (c) should be located elsewhere in the rule and not with department requirements for initial licensure.

aa. It appears that the phrase “cumulative violations” in s. NR 113.05 (3) (e) is unnecessary. Also, should this paragraph indicate that a person may reapply for a license after one year elapses, as provided in s. 146.20 (5) (b), Stats.?

ab. The language describing the exemption in s. NR 113.05 (4) (c) would be substantially more useful if it specified by cross-reference which of the rules related to servicing are applicable to the farmer.

ac. Section NR 113.06 does not contain an explicit statement of the licensing requirement. Is a license required for each vehicle, or does a single license cover all vehicles owned by a certified operator? Also, what is the “license sticker” in s. NR 113.06 (3) and where may it be obtained? Is an application required for a license under this section?

ad. As s. NR 113.06 (3) (a) is drafted, an operator will violate the statute if a vehicle is not in operational condition, even though the vehicle is not used for servicing.

ae. The term “utilized” in s. NR 113.06 (3) (b) should be replaced by “used.”

af. The last sentence of s. NR 113.06 (3) (b) could be clarified. There does not appear to be a reason to exempt a vehicle used for the servicing of portable restrooms from the other requirements of that paragraph if the vehicle consists of a tank used to remove portable restroom waste. If the authorization to use a vehicle for other tasks is meant to apply to equipment such as flatbed trucks used to haul portable restrooms, that exemption would appear to apply equally well to similar vehicles used by any certified operator.

ag. The phrase “to the general public” in s. NR 113.06 (3) (c) may not be necessary. “Nuisance” is defined in s. NR 113.03 (39) to mean “any source of filth or probable cause of sickness.” By limiting this term to the general public, the rule appears to authorize a nuisance if the general public is not affected.

ah. What is authorized in s. NR 113.06 (3) (d) 4 regarding a “supplemental” tank? Does this mean a smaller tank must be carried on a truck in addition to a tank larger than 1,000 gallons, or is this authorizing a vehicle to carry a single tank smaller than 1,000 gallons?

ai. There does not appear to be any reason to establish tank attachment requirements in both s. NR 113.06 (3) (f) and (g).

aj. Should the last phrase in s. NR 113.06 (4) (a) be changed to “in a manner that does not cause a nuisance”?

ak. Section NR 113.06 (4) (c) should commence with “The person or business shall....”

al. What is “designated capacity” in s. NR 113.08 (1) (a)? Also, at the end of that paragraph, the last comma should be deleted and the spelling of “and” corrected.

am. In s. NR 113.08 (1) (b) and (c), what differentiates large systems from small systems? Also, in par. (b), what happens if no contract is reached? Finally, the Note to par. (b) should indicate the appropriate Administrative Code citation.

an. The relationship of s. NR 113.08 (1) (c) 5 to the remainder of the paragraph should be clarified. Should “in addition to” be replaced by “notwithstanding”?

ao. In s. NR 113.08 (2) (a), reference is made to nonwinter disposal during a period between April 16 and November 14. However, sub. (1) (a) defines the term “winter” to mean the period each year when the ground is frozen. Is it certain that in each year the ground will thaw on April 16 and refreeze on November 15 and remain frozen from November 15 through

April 15? Given the references to disposal in sub. (2) (a) and (b), why is a definition of winter needed at all in sub. (1) (a)?

ap. In s. NR 113.08 (2) (a) 3, “there are no” should be replaced by “the only” and “other than” should be replaced by “are those.”

aq. In s. NR 113.08 (3) (b) 1, it appears that the word “obtain” should be replaced by the word “determine.”

ar. In s. NR 113.08 (3) (b) 2, why is the second sentence necessary? The first sentence applies to septage applied on the surface of soils; it has nothing to do with incorporation or injection into the soil.

as. Is it necessary to refer to “low and high use fields” in s. NR 113.08 (3) (b) 11? That would appear to include all fields.

at. It is sufficient to establish the nitrogen requirements by stating that they are based on the University of Wisconsin (UW)-Extension Bulletin. The additional sentence stating that the UW-Extension Bulletin is incorporated by reference is unnecessary. The statement regarding availability of copies of the UW-Extension Bulletin for inspection should be changed to a note. See ss. NR 113.08 (3) (b) 12 and 113.10 (1).

au. The sixth and seventh items in Table 4, establishing minimum distances to a residence, business or recreational area should be clarified. The sixth item could be clarified by adding “without permission from the owner or occupant,” if that is what is meant. The seventh item could be clarified by deleting “to spread closer than usual.” Also, is “recreational area” intentionally omitted from the seventh item?

av. In s. NR 113.08 (3) (b) 17, “historical site” is a defined term and “designated” a modification to that term that should be deleted.

aw. What is a “reclamation site” in s. NR 113.08 (3) (d) 1? See, also, s. NR 113.08 (3) (e) (intro.).

ax. The superfluous “s.” in s. NR 113.08 (3) (d) 2 should be eliminated.

ay. In s. NR 113.08 (3) (d) 3. f. to h., what do the phrases “high potential for public exposure” and “low potential for public exposure” mean? Also, in sub. (f), what standards will the department use to provide an exemption?

az. When is a site evaluation required in s. NR 113.09 (1)? Also, what is “landscape position”?

ba. The second sentence of s. NR 113.09 (2) should be modified by deleting “typically” and adding “except as follows:” at the end. The third and fourth sentences of that subsection should be numbered as pars. (a) and (b) and the last sentence should commence “For all low use fields....” Also, what is meant by “variability”?

bb. In s. NR 113.10 (3), how is the loading rate limited by soil characteristics?

bc. A verb is missing in s. NR 113.10 (4) (intro.).

bd. Section NR 113.11 (2) (c) should refer to a “septage disposal ordinance” rather than a “disposal ordinance.” Also, what is the meaning of the phrase “and rules adopted under this section”?

be. In s. NR 113.12 (1) (intro.), should the phrase “at least” be inserted before “7”?

bf. In s. NR 113.12 (4) (intro.), why is the phrase “or its designee” used? In par. (a), relating to annual submittals, what is the relationship of an agricultural soil analysis for each high use field once every four years?

bg. The written certification required under s. NR 113.12 (4) (b) 3. g. would be more useful if the specific pathogen reduction requirements were set forth in the form and the operator could check or circle one or the other.

bh. In s. NR 113.13 (2), the rule should treat a facility that has a capacity of exactly 25,000 gallons.

bi. In s. NR 113.13 (3) (i), does the final clause mean that there is more than 25,000 gallons of septage added to the facility or that the addition of a given amount of septage to the facility results in the facility holding more than 25,000 gallons of any material?